

Public Utility Commission of Texas

Memorandum

TO: Chairman Donna L. Nelson
Commissioner Brandy Marty Marquez

FROM: Commissioner Kenneth W. Anderson, Jr.

DATE: February 8, 2017

RE: **Open Meeting of February 9, 2017, Docket No. 45175; Agenda Item No. 4**
Appeal of Brazos Electric Power Cooperative, Inc. and Denton County Electric Cooperative, Inc. d/b/a CoServ Electric from an Ordinance of The Colony, Texas, and, in the Alternative, Application for a Declaratory Order

Before us is a proposal for decision (PFD) that recommends that we grant the applicants' requested relief. The Administrative Law Judge (ALJ) concludes for the reasons explained in the PFD that the City of the Colony's (the City) ordinance is void and unenforceable on its face because it regulates improperly the services and operations of Brazos Electric Power Cooperative, Inc. (Brazos Electric) and CoServ Electric (CoServ) (collectively "the cooperatives").¹ I agree with the ALJ's result, but not necessarily for the all of the reasons set out in the PFD, which I believe goes beyond what is necessary to decide the matter before us.² I would find that the City's denial of Brazos Electric's Specific-Use Permit (SUP) application renders its ordinance unenforceable under the facts of this case because it regulates the cooperatives' services in violation of section 41.005 of the Public Utility Regulatory Act (PURA)³ as well as the pervasive regulatory scheme over transmission service within the Electric Reliability Council of Texas (ERCOT) created by the Texas Legislature and set out in PURA.

I. MUNICIPAL REGULATION OF COOPERATIVES

Generally under PURA electric cooperatives are not electric utilities. PURA section 31.003(6)(G) specifically excludes an electric cooperative from the term electric utility.⁴ However, PURA Chapter 35, the chapter setting out the Commission's authority to regulate wholesale transmission service, specifically includes "electric cooperatives" within the term

¹ The Public Utility Commission of Texas (Commission) has appellate jurisdiction under the Public Utility Regulatory Act (PURA) section 32.001(b). Public Utility Regulatory Act, Tex. Util. Code Ann. § 32.001(b) (West 2016) (PURA). *See Appeal of Brazos Electric Power Cooperative, Inc. and Denton County Electric Cooperative, Inc. d/b/a CoServ Electric from an Ordinance of The Colony, Texas, and, In the Alternative, Application for a Declaratory Order*, Docket No. 45175, Order on Appeal of SOAH Order No. 7 (July 26, 2016).

² The ALJ spent considerable time analyzing and discussing whether the City's action constituted the regulation of the cooperatives' "rates" or "operations," which I believe was unnecessary. Because the City's application of its ordinance in this case impermissibly regulates Brazos Electric's services, the Commission does not need to decide whether the Colony regulated the cooperative's rates or operations. In fairness to the ALJ, much of the structure of the analysis was dictated by the Preliminary Order in this case.

³ PURA § 41.005.

⁴ PURA § 31.003(6)(G).

“electric utility.”⁵ PURA also includes an “electric utility” within the definition of a “public utility.”⁶ For purposes of wholesale transmission service, then, an electric cooperative is an electric utility and a public utility.

PURA section 41.005 specifically prohibits a municipality from *directly* or *indirectly* regulating “the rates, operations, and *services* of an electric cooperative, except, with respect to operations, to the extent *necessary* to protect the public health, safety, or welfare.”⁷ I will address whether the City’s ordinance regulates the cooperative’s services. PURA section 41.005 specifically limits a municipality’s regulatory authority over cooperatives to the protection of the public health, safety, and welfare associated with a cooperative’s *operations* and then only to the extent *necessary*.⁸ The authority to regulate the cooperative’s rates and *services* lies solely with the Commission.

PURA intentionally defines “service” broadly to include “any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utility’s duties under this title”⁹ The definition of “transmission services” includes “the construction or enlargement of facilities.”¹⁰ Read together, the definition of “service” includes “transmission services” because the construction of facilities is an “act performed” by the public utility as it carries out its duties. The definition of “service” seems to include both the substation as well as its location. Because the location of the substation affects the ability of the utility to provide transmission service, the location of the substation becomes intertwined with the provision of the service. Therefore, when a municipality determines where a cooperative may or may not locate a transmission substation it regulates the cooperative’s services.

In this case, Brazos Electric is constructing the Josey Substation to provide wholesale transmission service.¹¹ The construction of the transmission substation constitutes the “construction of facilities.” Because Brazos Electric provides wholesale transmission service, the cooperative is an electric utility and a public utility. As part of its planning process, Brazos Electric determined a location for the substation that would provide the most efficient, cost-effective, and reliable service. Brazos Electric’s siting of the transmission substation is interwoven with the development and construction of the substation and constitutes a “service” as defined in PURA section 11.003(19).¹² In denying the SUP Application, the City dictated where Brazos Electric could not locate its transmission facility and improperly regulated the services of the cooperative in violation of PURA section 41.005.¹³

⁵ PURA § 35.001.

⁶ PURA § 11.004.

⁷ PURA § 41.005 (emphasis added).

⁸ *Id.*

⁹ PURA § 11.003(19).

¹⁰ PURA § 31.002(20).

¹¹ Joint Applicants Ex. 4 at 17 (Hamlin Direct).

¹² PURA § 11.003(19).

¹³ PURA § 41.005.

II. PERVASIVE REGULATORY SCHEME

PURA occupies the field of utility regulation. The Texas Legislature enacted PURA “to protect the public interest inherent in the rates and services of public utilities”¹⁴ and “to establish a comprehensive and adequate regulatory system for public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the utilities.”¹⁵ The Texas Supreme Court reiterated PURA’s pervasive regulatory scheme stating “the statutory description of PURA as ‘comprehensive’ demonstrates the Legislature’s belief that PURA would comprehend all or virtually all pertinent considerations involving electric utilities operating in Texas. That is, PURA is intended to serve as a ‘pervasive regulatory scheme’”¹⁶ This permits comprehensive regulation by the Commission rather than piecemeal regulation of transmission services by multiple authorities.

The Legislature has granted the Commission exclusive authority over wholesale transmission service and other aspects of utility regulation.¹⁷ Chapter 35 of PURA grants the Commission the authority to “ensure that an electric utility or transmission and distribution utility provides nondiscriminatory access to wholesale transmission service for qualifying facilities, exempt wholesale generators, power marketers, power generation companies, retail electric providers, and other electric utilities or transmission and distribution utilities.”¹⁸ PURA Chapter 41 specifically grants the Commission jurisdiction over electric cooperatives “to regulate wholesale transmission rates and *service*, including terms of access, to the extent provided in Subchapter A, Chapter 35.”¹⁹

To meet increased demand for the Grandscape Development, Brazos Electric proposed building the Josey Substation to provide wholesale transmission service to CoServ.²⁰ The City zoned the tract of land as PD-10, which allows substations only if the City grants a SUP.²¹ Brazos Electric applied for a SUP which the City ultimately denied.²² The City’s action hinders Brazos Electric’s ability to provide reliable wholesale transmission service to CoServ and limits the available transmission capacity in the area.²³ The site Brazos Electric chose was integral to its planning process because it would provide the most efficient, cost effective, and reliable service. The City’s denial of the SUP application exceeds the City’s authority by regulating transmission service within ERCOT, contrary to the pervasive regulatory structure of PURA which reserves

¹⁴ PURA § 11.002(a).

¹⁵ *Id.*

¹⁶ *In re Entergy Corp.*, 142 S.W.3d 316, 323 (Tex. 2004).

¹⁷ *E.g.*, PURA §§ 35.004, 40.004, and 41.004.

¹⁸ PURA § 35.004(b).

¹⁹ PURA § 41.004(1) (emphasis added).

²⁰ Joint Applicants Ex. 4 at 17 (Hamlin Direct).

²¹ City Ex. 2 at 29, Att. JMJ-13 (Joyce Direct).

²² City Ex. 2 at 33 (Joyce Direct).

²³ Joint Applicants Ex. 1 at 22 (York Direct). To meet the growing electricity demand in the area, Brazos Electric installed two 75-megavolt ampere (MVA) transformers at its Hebron Substation. *Id.*

that authority to the Commission. Permitting the City to control the site of the transmission substation thwarts the comprehensive regulatory authority the Legislature granted to the Commission.

III. CONCLUSION

The City acted impermissibly when it denied Brazos' application for a SUP to build a transmission substation. The challenged ordinance does not violate PURA on its face. However, the City's ordinance, as applied by the City, violates PURA section 41.005 because it regulates the cooperative's services by dictating where it may construct a transmission substation. In addition, the City undermined PURA's pervasive regulatory scheme when it prohibited the construction of substation facilities because the location of the substation becomes intertwined with the provision of the service. I want to be clear that I am not recommending that we void the City's ordinance, but declare it unenforceable as applied in this case.

I look forward to discussing these issues with you at the open meeting.